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No. 90-1240

In the Supreme Court of the United States

OCTOBER TERM, 1990

STEVEN ALLISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner failed to establish a prima facie case of racial discrimination in the government's exercise of its peremptory challenges.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Amadeo v. *Zant*, 486 U.S. 214 (1988)	6
Batson v. *Kentucky*, 476 U.S. 79 (1986)	2, 5, 6, 7
Harrison v. *Ryan*, 909 F.2d 84 (3d Cir. 1990)	7
Powers v. *Ohio*, No. 89-5011 (Apr. 1, 1991)	6
Pullman Standard v. *Swint*, 456 U.S. 273 (1982)	7
United States v. *Allen*, 814 F.2d 977 (4th Cir. 1987)	7
United States v. *Clemmons*, 892 F.2d 1153 (3d Cir.), cert. denied, 110 S. Ct. 2623 (1990)	10
United States v. *David*, 803 F.2d 1567 (11th Cir. 1988)	7
United States v. *Dawn*, 897 F.2d 1444 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990)	8
United States v. *Grandison*, 885 F.2d 143 (4th Cir. 1989), cert. denied, 110 S. Ct. 2178 (1990)	8
United States v. *Johnson*, 873 F.2d 1137 (8th Cir. 1989)	7
United States v. *Lewis*, 837 F.2d 415 (9th Cir. 1988)	9
United States v. *Moore*, 895 F.2d 484 (8th Cir. 1990)	8
United States v. *Rogers*, 850 F.2d 435 (8th Cir. 1988)	8
United States v. *Ruiz*, 894 F.2d 501 (2d Cir. 1990)	7

Cases—Continued: Page

United States v. *Walton*, 908 F.2d 1289 (6th Cir. 1990) 10

Statute:

21 U.S.C. 846 2
21 U.S.C. 2106 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 7a-43a) is reported at 908 F.2d 1531.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990. A petition for rehearing was denied on November 8, 1990. Pet. App. 44a-45a. The petition for a writ of certiorari was filed on February 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to possess and at-

tempted possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of imprisonment for 120 months, to be followed by five years' supervised release, and fined $5,000. The court of appeals affirmed. Pet. App. 7a-43a.

1. Petitioner and his co-defendant are black. For jury selection, a 40-person venire was assembled. The venire included six black potential jurors. The prosecutor exercised three of his six peremptory challenges against black individuals and two against white individuals; one peremptory challenge was not used. The impaneled jury included two black jurors, and one black juror served as an alternate. Pet. App. 25a, 34a-35a.

After the prosecutor had challenged two black and two white jurors, petitioner raised the issue whether the challenges to black jurors were improper under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The trial court noted that it could require the prosecutor to explain those strikes, but it did not do so at that time. Jury selection continued, and the prosecutor struck a third black juror. At the conclusion of jury selection, but before the selection of alternate jurors, the court asked the prosecutor to give his reasons for challenging the black jurors. The prosecutor disclaimed any racial motivation for the strikes, indicating that he had preferred other individuals for the jury. When the court asked the prosecutor to elaborate, the prosecutor added:

> There are various reasons, your honor. I can only allude to various factors which the courts go over. They include education, family, background, type of employment, various aspects, age. Those are all of the factors that I've in-

> cluded. I can't say one factor weighs over another one. There's a lot of times, your honor, that it's just a reaction to the situation.

Pet. App. 27a-29a.

Although petitioner challenged the adequacy of that statement of reasons, he did not point to any factors suggesting that the prosecutor's strikes were racially motivated. In particular, petitioner did not raise any claim that white jurors with essentially similar characteristics as the struck black jurors were accepted by the prosecutor, nor did petitioner contend that any comments of the prosecutor during voir dire revealed racial bias. Pet. App. 34a-35a n.7. The district court rejected petitioner's *Batson* claim. In a post-trial motion for a new trial, petitioner renewed his *Batson* claim, but the court denied the motion without opinion. *Id.* at 29a-30a & n.5.

2. A divided court of appeals affirmed. Petitioner contended that the district court had implicitly found a prima facie case of a *Batson* violation, the facts supported such a finding, and the prosecutor's explanations for his strikes of black jurors were inadequate. Pet. App. 26a. The court of appeals found that petitioner had failed to establish a prima facie case of purposeful discrimination, and it therefore rejected his *Batson* claim. *Id.* at 30a.

The court noted that because the district court had not explained its reasoning, it was not possible to tell whether the district court had found the absence of a prima facie case or had credited the prosecutor's explanations. Pet. App. 29a-30a. While recognizing that the determination whether a prima facie case under *Batson* exists is "ordinarily, if not always, [to] be made in the first instance by the trial court," the court found that a remand was not required in

this particular case because the record was clear and it did not support the existence of a prima facie case. *Id.* at 30a.

In support of that conclusion, the court stated that although not dispositive, "the unchallenged presence of three blacks on the jury undercuts any inference of impermissible discrimination that might arise simply by the striking of other blacks," particularly since the prosecutor had enough strikes to remove all of them. Pet. App. 32a, 35a. Moreover, the court explained that a defendant's burden to establish a prima facie case cannot be carried by noting that some black jurors were struck without obvious explanation; some indicia of discrimination are required. *Id.* at 33a. Petitioner, however, had "pointed to nothing that strongly suggests racial motivation was the basis for the strikes used." *Id.* at 34a. The court also observed that neither in the trial court nor on appeal had petitioner sought to compare the general characteristics of the black jurors who were excluded with the white jurors who were seated in an effort to establish discrimination between similarly situated jurors. Nor did numerical considerations support an inference of discrimination, because the percentage of blacks on the jury (including alternates) exceeded their percentage on the venire. *Id.* at 34a-35a. In light of those factors, the court rejected petitioner's *Batson* claim.[1]

Judge Hatchett dissented, arguing that petitioner had established a prima facie case and that the pros-

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[1] The majority opinion noted that one of the panel members, Judge Bright, "would add that the prosecutor gave an explanation which the trial judge impliedly deemed satisfactory and that the whole record, including the prosecutor's explanation, indicates the absence of racial animus." Pet. App. 35a-36a n.9.

ecutor's explanations were not sufficient. Pet. App. 36a-43a. Although agreeing with the majority that factors such as the presence of blacks on the jury, the use of some strikes against white jurors, the comparative percentages of blacks on the venire and the jury, and the prosecutor's failure to exhaust his strikes had "some relevance," he concluded that those factors were not "controlling" and that other considerations here favored the existence of a prima facie case. *Id.* at 40a-41a.

ARGUMENT

Petitioner contends (Pet. 10-30) that the court of appeals, in rejecting his *Batson* claim, committed three errors: it should have remanded to the trial court for that court to determine whether petitioner had established a prima facie case; it should have concluded that a prima facie case was made out on this record; and it should have found that the prosecutor's stated reasons for the challenges were inadequate.

1. In *Batson*, this Court held that in order to establish a prima facie case of purposeful discrimination in the selection of the petit jury, a criminal defendant must show the existence of "relevant circumstances [that] raise an inference that the prosecutor used [his peremptory challenges] to exclude the veniremen from the petit jury on account of their race." 475 U.S. at 96. Only when the defendant has made such a prima facie showing does "the burden shift[] to the [prosecutor] to come forward with a neutral explanation for challenging black jurors." *Id.* at 97.

In this case, the court of appeals concluded that petitioner's showing did not rise to the level necessary to establish a prima facie case of discrimina-

tion, and it was therefore unnecessary to evaluate whether the prosecutor had given adequate, race-neutral explanations for the strikes. Contrary to petitioner's contention (Pet. 13-14), the court of appeals did not violate *Batson* in evaluating the sufficiency of petitioner's prima facie case rather than ordering a remand. It is unquestionably the primary responsibility of the trial courts to implement *Batson*'s commands, and to make timely determinations on claims of discrimination when they are raised by a defendant. See *Batson*, 476 U.S. at 97; see also *Powers* v. *Ohio*, No. 89-5011 (Apr. 1, 1991), slip op. 16 ("It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice."). But the court of appeals recognized that principle here. See Pet. App. 30a ("*Batson* contemplated that the determination of whether a prima facie case * * * is established will ordinarily, if not always, be made in the first instance by the trial court."). The court simply concluded that, although the trial court should have made an express finding on the prima facie case issue, its failure to do so did not require a time-consuming and purposeless remand when the record was sufficiently developed for the court to determine the issue as a matter of law. This was not a case in which findings of historical fact had to be made before the sufficiency of petitioner's showing could be evaluated. Cf. *Amadeo* v. *Zant*, 486 U.S. 214 (1988). Accordingly, the court of appeals' pragmatic response to the question before it constituted a sound use of judicial resources.[2]

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[2] Unlike the ultimate question whether the prosecutor has engaged in intentional discrimination, which is a question of

To be sure, it would have been perfectly appropriate for the court of appeals to remand for further proceedings if it had elected to do so. See 28 U.S.C. 2106. But none of the cases cited by petitioner (Pet. 14) holds that a court of appeals invariably must remand in a *Batson* case, regardless of how pointless a remand would be.[3] And *Batson* itself contains no such inflexible mandate. See 476 U.S. at 99 ("We decline * * * to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.").

2. The court of appeals correctly held that petitioner failed to establish a prima facie case. *Batson* lays down no rigid rules in evaluating the existence of a prima facie case; rather, it directs consideration of "all relevant circumstances." 476 U.S. at 96-97.

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fact that largely turns on credibility, see *Batson*, 476 U.S. at 98 n.21, the existence of a prima facie case is better characterized as a mixed question of fact and law. Although trial courts are, in general, better situated to evaluate the prima facie case issue, particular situations—such as the present case—involve clear enough fact patterns to enable a reviewing court to determine the issue as a matter of law. Cf. *Pullman Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982).

[3] In two of the cases, the courts of appeals remanded because the trials had occurred before *Batson*, and there were no sufficient district court proceedings. See *United States* v. *David*, 803 F.2d 1567 (11th Cir. 1986); *United States* v. *Allen*, 814 F.2d 977 (4th Cir. 1987). In one of the cases, the court of appeals found a prima facie case, then remanded for the prosecutor to provide explanations. *United States* v. *Johnson*, 873 F.2d 1137 (8th Cir. 1989). And in the remaining cases, the court either remanded for a new trial upon finding a *Batson* violation, *Harrison* v. *Ryan*, 909 F.2d 84 (3d Cir. 1990), or affirmed the conviction after rejecting a *Batson* objection, *United States* v. *Ruiz*, 894 F.2d 501, 506 (2d Cir. 1990).

The Court noted, as examples of evidence that could support a prima facie case, the existence of a pattern of strikes against blacks, or comments by the prosecutor during voir dire. *Id.* at 97. Petitioner presented no satisfactory evidence of discrimination, either on the factors identified by the Court in *Batson*, or on other factors that have been identified by the courts in subsequent cases.

To begin with, the prosecutor did not engage in a pattern of strikes against blacks. The prosecutor had exercised two peremptory strikes against black jurors and two against white jurors when petitioner initially noted his *Batson* objection; after that objection, the prosecutor struck another black juror, but the record suggests that he may not have been aware of that juror's race. See Pet. App. 28a; Gov't C.A. Br. 24-25. Although the prosecutor had not exhausted his challenges, and could have used them in a discriminatory fashion if he had so desired, two black jurors were impaneled, as well as one black alternate juror. On comparable records, courts have had no difficulty rejecting an inference of purposeful discrimination on grounds of race.[4]

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[4] See, *e.g.*, *United States* v. *Dawn*, 897 F.2d 1444, 1448 (8th Cir.) (government used six of seven peremptory challenges to strike blacks; jury included two blacks), cert. denied, 111 S. Ct. 389 (1990); *United States* v. *Moore*, 895 F.2d 484, 486 (8th Cir. 1990) (government used four of six peremptory challenges to strike blacks; three blacks sat on the jury); *United States* v. *Grandison*, 885 F.2d 143 (4th Cir. 1989) (government used six of nine peremptory challenges to strike blacks; two blacks sat on the jury and three blacks served as alternates), cert. denied, 110 S. Ct. 2178 (1990); *United States* v. *Rogers*, 850 F.2d 435, 437 (8th Cir. 1988) (government used three of seven peremptory challenges to strike blacks; jury included two blacks and one black alternate).

Despite having an opportunity to do so, petitioner did not come forward with any other evidence to support his prima facie case of discrimination. Although petitioner makes a belated effort to suggest the presence of discrimination by comparing the struck black jurors to the accepted white jurors (see Pet. 19-22), in the trial court and in the court of appeals petitioner made no such showing, see Pet. App. 34a n.7. If the evidence had as much probative force as petitioner now contends, it is difficult to understand why petitioner would have remained silent about it throughout the proceedings below.

Finally, petitioner claims that the prosecutor's statements to the trial judge, made after petitioner had raised his *Batson* objection, somehow revealed a discriminatory intent. That argument is without merit. First, nothing in the prosecutor's statements remotely indicates an intent to discriminate; to the contrary, the prosecutor affirmed that his challenges rested on such neutral criteria as education, family background, employment, and age. Second, the proper focus, in determining whether a prima facie case exists, is not on what the prosecutor says after the defendant makes a *Batson* objection and the court requests an explanation; rather, because there must be a prima facie case before any explanation is required, the proper focus is on the prosecutor's conduct and his comments in the course of jury selection itself. As to that process, petitioner has offered nothing that casts doubt on the race-neutrality of the prosecutor's motives.[5]

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[5] Contrary to petitioner's contention (Pet. 23-24), *United States* v. *Lewis*, 837 F.2d 415, 417 (9th Cir. 1988), does not hold that the prosecutor's statements made in explanation are relevant to the existence of a prima facie case; rather, the

3. Finally, petitioner's contention (Pet. 25-30) that the prosecutor's explanation was insufficient does not warrant this Court's review because that issue is not presented on this record and was not decided by the court of appeals. Where no prima facie case is made out, no inquiry into discriminatory motive is required. Therefore, the prosecutor's failure to provide a clear and specific explanation for his challenges would not be a ground for relief. Only if the defendant carries his burden to establish a prima facie case—thereby raising an inference of discrimination—does the burden shift to the prosecution to articulate reasons. Because the court of appeals correctly held that petitioner did not carry that burden, the judgment does not depend on whether the prosecutor's reasons would pass a strict *Batson* analysis. *United States* v. *Walton*, 908 F.2d 1289, 1298 (6th Cir. 1990).

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court merely accepted that contention for the sake of argument, and found that the particular explanations were race-neutral. Nor did *United States* v. *Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989), cert. denied, 110 S. Ct. 2623 (1990), find such statements relevant to the prima facie case. The court said only that "[i]f the prosecutor's explanation raises more concern than it puts to rest, courts cannot effectively close their eyes to that fact by simply deciding that the defendant has not made out a prima facie case." 892 F.2d at 1156. Unlike the explanation in *Clemmons* (that the prosecutor struck a black juror because the juror was Hindu), the explanation here did not raise additional concerns. See Pet. App. 35a n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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